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December 28, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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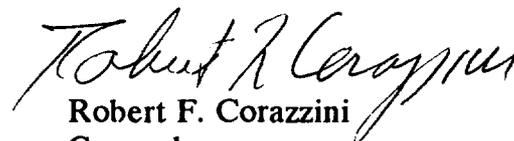
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **Petition for Reconsideration & Clarification of
Report and Order
MM Docket No. 97-217
File No. RM-9060**

Dear Ms. Salas:

Transmitted herewith on behalf of Region IV Educational Service Center, George Mason University Instructional Foundation, Inc., Humanities Instructional TV Educational Center, Inc., Valley Lutheran High School, Indiana Higher Education Telecommunications System, Views on Learning, Inc., Butler Community College, Denver Public Schools and Minnesota Public Radio, is an original and five (5) copies of their joint Petition for Reconsideration & Clarification of Report and Order in MM Docket No. 97-217. Pursuant to the attached certificate of service, a copy of these Comments have also been hand delivered to the Chairman and each Commissioner. Should there be any questions concerning this material, please communicate directly with the undersigned.

Very truly yours,


Robert F. Corazzini
Counsel

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Amendment of Parts 1, 21 and 74 to Enable |) | MM Docket No. 97-217 |
| Multipoint Distribution Service |) | |
| And Instructional Television Fixed |) | File No. RM-9060 |
| Service Licensees to Engage in Fixed |) | |
| Two-Way Transmissions |) | |

**PETITION FOR RECONSIDERATION AND CLARIFICATION
OF REPORT AND ORDER**

Comes now Region IV Education Service Center, George Mason University Instructional Foundation, Inc., Humanities Instructional TV Educational Center, Inc., Valley Lutheran High School, Indiana Higher Education Telecommunications System, Views on Learning, Inc., Butler Community College, Denver Public Schools and Minnesota Public Radio (collectively, the "ITFS Commenting Parties"), by the undersigned counsel to present their requests for clarification and reconsideration to the Federal Communications Commission of the above-captioned Report and Order. On September 25, 1998, the Commission released a Report and Order in this docket, Amendments of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, FCC 98-231 (rel. September 25, 1998) (hereinafter "Two-Way Order"). This Two-Way Order appeared in the Federal Register on November 25, 1998, providing a 30-day petition for reconsideration period that terminates on December 28, 1998. The

ITFS Commenting Parties present the following requests for clarification and reconsideration regarding the Two-Way Order:

I. Channel Swapping and Shifting

1. The Commission should amend Sections 21.901(d) and 74.902(f) of its rules to allow any ITFS licensee to swap channels with any ITFS or MDS licensee regardless of whether one of the licensees utilizes digital technology or leases to a lessee that utilizes digital technology. There is no discernable rationale as to why channel swaps should be limited to only those channels associated with digital emissions. Analog systems would equally benefit from having the flexibility to swap channels. In addition, wireless cable operators planning two-way systems may need to swap channels in order to plan their new services prior to "utilizing" digital transmissions, as required by the new rules. Therefore, the Commission should allow channel swaps between all MDS and ITFS channels regardless of whether digital transmissions are employed in the market.

2. Likewise, the Commission should allow ITFS licensees to channel shift regardless of whether digital transmissions are being employed by the ITFS licensee or the operator to whom it leases its excess capacity.^{1/} It is illogical to apply one set of rules to an analog system and a second set to a digital system where there is no technical basis to differentiate between the two. An analog wireless cable operator and ITFS

^{1/} While the Two-Way Order would permit an ITFS licensee to channel shift if it is leasing its excess capacity to a wireless cable operator which utilizes digital transmissions, revised Section 74.931(d) only permits channel shifting to other MDS or ITFS channels if the ITFS licensee itself is operating digitally. Two-Way Order at ¶ 101.

licensee should have the same flexibility as a digital operator to shift the ITFS programming of an ITFS licensee onto another MDS or ITFS channel in its system. In order to fully promote the competitive posture of wireless cable, the Commission should permit the greatest flexibility to MDS and ITFS licensees in order to allow them to be guided by market demand rather than by administrative restraints. This includes the ability to channel shift despite operating in an analog mode.

II. ITFS Major Change Applications

3. The Commission should allow the filing of any ITFS major change application, even those unrelated to two-way proposals, during the initial one-week filing window. While Section 74.911(e) of the Commission's rules specifically states that the one-week window shall be opened for the filing of "high-power signal booster station, response station hub, and I channels point-to-multipoint transmissions licenses," nothing prevents the Commission from simultaneously opening an ITFS window for major modification applications that are not directly related to two-way transmissions. 47 U.S.C. § 74.911(c) (1995). Such a window can be essential to the development of existing wireless cable systems utilizing ITFS excess capacity from licensees that have not had the opportunity to modify since December, 1996.^{2/} Further, any such ITFS licensee that had planned to file a modification application in the next ITFS filing window will

^{2/} See Public Notice, DA 96-1724 (released October 17, 1996) ("Mass Media Announces Commencement of Sixty (60) Day Period for Filing ITFS Modifications and Amendments Seeking to Co-Locate Facilities with Wireless Cable Operators").

indirectly affect or be affected by the two-way initial one-week window. Conducting both filing windows simultaneously would relieve the Commission's dilemma of whether to conduct an ITFS window prior to the two-way initial one-week window, which would render two-way systems more difficult to engineer, or following the two-way window, which will result in making ITFS downstream modifications more burdensome to prepare and which would preclude protection to receive sites requested as part of those modifications. By accepting both types of applications concurrently, all applicants will be similarly situated in that they all will be subject to resolving interference concerns together during the sixty day window following the tendering of filing of such applications, rather than placing the burden on one particular group of applicants. To conduct separate filing windows would be to unjustly favor one group of applicants over another, for which there is no rational basis.

4. Any ITFS major modification applications submitted during the initial one-week window or any rolling one-day filing window that cause mutual interference need not be considered as mutually exclusive and therefore, subject to auction. Pursuant to the Balanced Budget Act of 1997, which expanded the Commission's auction authority under Section 309(j) of the Communications Act, the Commission shall grant a license or permit to "a qualified applicant through a system of competitive bidding...[i]f... mutually exclusive applications are accepted for any initial license or construction permit." Balanced Budget Act of 1997, § 3002(a)(1), *codified as* 47 U.S.C. § 309(j) [emphasis added]. However, the Commission is not mandated by the terms of Section

309(j) to auction mutually exclusive modification applications. See In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, at ¶ 14 (rel. August 18, 1998) (the "Auction Order"). While the Commission states that it "may be appropriate in some cases to treat a major modification as an initial application for competitive bidding purposes," that determination is subject to the Commission's discretion, and by its own admission, the Commission concedes that its conclusion is only due to "the absence of another viable method for resolving instances of mutual exclusivity in a timely and efficient manner." Id. at ¶ 16.

5. The two-way rules present a solution to this predicament. According to the Two-Way Order, the Commission has deemed that "applications filed on the same day will not be treated as mutually exclusive by the Commission and that it will be the responsibility of the parties to resolve any conflicts." Two-Way Order at ¶ 65. Certainly, the FCC has the authority to determine that any ITFS major modification applications filed in the two-way initial window which interfere with each other will not be considered mutually exclusive but that conflicts are to be resolved through the efforts of the applicants.^{3/} By processing ITFS modification applications in accordance with the processing rules for two-way applications, the Commission promotes rapid deployment of service to the public by removing the processing delays which are currently experienced

^{3/} The Commission considers the threat of having to immediately cease operations in event of interference to another party as sufficient motivation for applicants to resolve potential problems. Two-Way Order at ¶ 70.

by the October, 1995 applications. Therefore, the Commission should clarify that ITFS modifications submitted during the initial one week or any rolling one-day filing window will be subject to the two-way rules and not be subject to auction.

III. 20-Day Notification Requirement by Response Stations

6. The 20-day notification requirement to a registered or previously proposed ITFS receive site prior to the activation of an MDS or ITFS response station required by Sections 21.909(n) and 74.939(p) of the Commission's rules should be eliminated as unnecessary and anti-competitive. Two-Way Order, §§ 21.909(n) and 74.939(p). No other provider of technological services bears a comparable restriction. While other service providers can deliver their services within a few hours of an order being placed, wireless cable operators must inform potential customers that service will not be available for at least three weeks due to this one requirement, placing them at a huge disadvantage in the marketplace. While it is recognized that such notice is beneficial in assisting ITFS licensees in tracking the source of interference to their receive sites if caused by downconverter overload, it is submitted that a significantly shorter reporting requirement will provide equally timely protection to the ITFS licensee.

7. Accordingly, it is proposed that MDS and ITFS licensees only be required to notify the ITFS licensee of a registered or previously proposed receive site located within 1960 feet of a response station within 24 hours of activation. Such notice should be deemed acceptable if provided by facsimile or e-mail. ITFS licensees recognize that the

competitive commercial success of a wireless cable operator is key to its ability to provide benefits to ITFS licensees and that there may be instances where immediate construction of a two-way response station is necessary. Therefore, by making this revision, wireless cable operators will be placed in the most pro-competitive stance in relation to other services yet ITFS licensees will be adequately informed of construction of nearby response stations. Likewise, ITFS licensees themselves who propose their own two-way educational distance learning systems may also have a need for and thus benefit from, the ability to begin the response transmissions immediately.

IV. Conclusion

8. In summary, the ITFS Commenting Parties believe that flexibility and equity should be the primary aspects of any policy regarding two-way transmissions and the Commission's regulation of ITFS spectrum. In order to utilize their channel capacity most efficiently, there needs to be opportunities for ITFS licensees to meet their different priorities with minimum constraints. This is particularly true for ITFS license holders, who have different levels of financial capabilities. Only through exercising the least regulatory scheme necessary will both the distance education providers and the wireless cable system operators realize the maximum benefits of the era of new technology in which both must fully participate in order to recognize their distinct, yet obviously compatible, goals. Accordingly, ITFS and wireless cable operators should be

free to structure their stations and systems in a way that meets their respective needs
thus allowing for the maximization of the usage of the ITFS spectrum.

Respectfully submitted,

Region IV Education Service Center
George Mason University Instructional Foundation, Inc.
Humanities Instructional TV Educational Center, Inc.
Valley Lutheran High School
Indiana Higher Education Telecommunications System
Views on Learning, Inc.
Butler Community College
Denver Public Schools
Minnesota Public Radio

By 
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December 28, 1998

CERTIFICATE OF SERVICE

I, Robert F. Corazzini, on behalf of Region IV Educational Service Center, UT Television, George Mason University Instructional Foundation, Inc., Humanities Instructional TV Educational Center, Inc., Valley Lutheran High School, Indiana Higher Education Telecommunications System, Views on Learning, Inc., Butler Community College, Denver Public Schools and Minnesota Public Radio, certify that a copy of the foregoing Comments in Proposed Rulemaking were delivered by hand to the following on December 28, 1998:

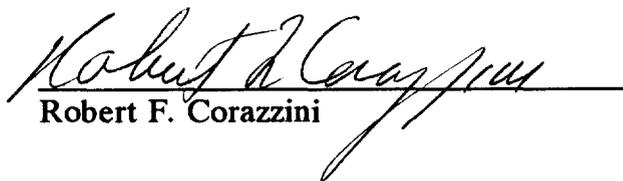
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